



**NEVADA COMMISSION ON ETHICS
EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION
REGARDING JUST AND SUFFICIENT CAUSE**

REQUEST FOR OPINION NO. 06-46

SUBJECT: BRIAN KROLICKI, TREASURER
STATE OF NEVADA

A. JURISDICTION:

The subject of this complaint, Brian Krolicki is the elected Nevada State Treasurer. He is a public officer as defined by NRS 281.4365. As such, the Nevada Commission on Ethics has jurisdiction over this complaint.

B. REPORT OF INVESTIGATIVE ACTIVITIES:

- Reviewed Request for Opinion 06-46 (complaint) received July 18, 2006 (TAB B)
- Reviewed Mr. Krolicki's response received August 23, 2006 (TAB C)
- Reviewed NRS 353B.155, .350(4), .360, .370(6) and .370(8) (TAB D)
- Reviewed the August 9, 2006, transcript of the Nevada Commission on Ethics meeting, agenda item 5, regarding Advisory Opinion Request submitted by Brian Krolicki (TAB E)
- Obtained Las Vegas Sun article dated February 11, 2005 regarding Brian Krolicki's announcement to run for lieutenant governor (TAB F)
- Reviewed the August 25, 2003, minutes of the Board of Trustees of the College Savings Plans of Nevada (TAB G)
- Relevant Nevada Commission on Ethics opinions (TAB H)

C. RECOMMENDATION:

Based on investigative activities, the Executive Director recommends the Panel find just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to the provisions of:

- NRS 281.481(1);
- NRS 281.481(2);
- NRS 281.481(7); and
- NRS 281.554.

SPECIFIC REASONS:

No allegations or credible evidence of any fact exists that amounts to or supports a potential violation by this public officer of the above provisions of NRS Chapter 281.

D. SUMMARY OF REQUEST FOR OPINION:

The complaint alleges violations of NRS 281.481(1), NRS 281.481(2), NRS 281.481(7) and NRS 281.554 by Brian Krolicki, Nevada State Treasurer. The following is the substance of the allegations:

- Mr. Krolicki is making use of television, radio, and print media advertising intended for the College Savings Plan of Nevada and the Nevada Prepaid Tuition Program to advance his political campaign for lieutenant governor. These ads feature very little about the plans, but prominently feature Mr. Krolicki at the same time that he is running for an elective office.
- Although the College Savings Program began in 2002, no ads were aired until September 2005, after Mr. Krolicki announced his intentions to run for lieutenant governor. Despite the advertising expense of the program, the Treasurer's office is not releasing specific information on the expense of this curiously timed advertising campaign because it claims the ads were not paid for with "public money".
- Two "private" companies, one a program manager (Upromise Investments, Inc.) and the other an investment manager (Vanguard Group), answer to and serve at the direction of Mr. Krolicki, both in his capacity as chairman of the board of trustees of the plan and as Treasurer of the State.
- The company that made the television ads, Rose-Glenn Advertising, has given tickets to Krolicki, which were reported on his campaign finance filings but not on his financial disclosure statement. The tickets were for the WIN 19th Annual Dinner and an event at the Nevada Museum of Art. It also appears that Rose-Glenn partner, Valerie Rose, and her husband gave Krolicki a \$1,500 in-kind contribution in 1998.
- Mr. Krolicki is using his position as Treasurer to run these ads to increase his name recognition while running for lieutenant governor. The ads did not even begin airing until Mr. Krolicki had announced his campaign. Mr. Krolicki is using his position as Treasurer and chairman of the board of trustees of the plans to expend public funds to promote himself.

- Mr. Krolicki cannot impartially oversee and evaluate the plan, its program manager, and its investment manager, when these companies are spending thousands and thousands of dollars to put his face on TV and in mailers and his name on TV, radio and in mailers.
- Mr. Krolicki is using state equipment toward the marketing effort of the programs and state time during production of the advertisements.
- He is also using his office to incur expenses or make expenditures to support his candidacy.

E. SUMMARY OF SUBJECT’S RESPONSE:

Mr. Krolicki denied the allegations set forth in the complaint. The following is the substance of his response:

- A Public Service Announcement featuring State Treasurer Krolicki and former U.S. Senator Richard Bryan began airing in late 2000. Paid advertising began in 2001. Television advertising featuring State Treasurer Krolicki and promoting Nevada’s College Savings Program aired in 2002, 2003, 2004 and 2005.
- The promotion and marketing of the plans is authorized by law (see NRS 353B.155, .350(4), .360, .370(6) and .370(8)).
- Neither UPromise Investments, Inc., nor the Vanguard Group, Inc. “answer” to State Treasurer Krolicki. Rather, UPromise is an independent contractor whose relationship with the Board of Trustees of the College Savings Plans of Nevada is governed by a contract approved by the board and by the State Board of Examiners. Vanguard does not have a contract with the State of Nevada. Rather, Vanguard is selected by, and contracts with, UPromise.
- Like most fund managers, UPromise and Vanguard receive a percentage of the amounts invested in the funds as their fees for their management services. UPromise spends a portion of its fees to market plans. While the contract with UPromise requires UPromise to market the plans in the State of Nevada, UPromise works directly with the contracted advertising agency to make the advertising buy; the Treasurer’s office is not involved in those expenditures.
- Because UPromise receives fees based on the assets of the funds, it benefits from additional investment in the funds. It is in UPromise’s interest, therefore, to market the plans. It is also in the State of Nevada’s interest to market the plans, since the State receives a fee from UPromise for each new investor.
- Valerie Glenn made a \$1,500 in-kind contribution to Brian Krolicki’s first campaign for State Treasurer in 1998. This contribution was less than 1% of the total contributions received by the Krolicki campaign in 1998. R & R Advertising (R&R) was selected to handle the marketing of the Prepaid Tuition Program in 1999. R & R’s contract expired in 2002 and R & R did not bid on the new contract. State Treasurer Krolicki was not a member of the evaluation committee in either 1999 or 2002. During the 2002 bid process, Rose Glenn Advertising received the highest score from every member of the evaluation committee. The WIN 19th Annual Dinner occurred in May of 2005, long after Rose-Glenn was awarded the marketing contract.
- The television advertisements feature State Treasurer Krolicki and/or his voice for 5 seconds of each 30-second spot. Similarly, the direct mail piece mentioned in the complaint features more information about the plans than about State Treasurer Krolicki.

A similar direct mail piece was also mailed to targeted households in June of 2005, to coincide with high school and middle school graduations, when parents may be thinking about the cost of college.

- In a conversation with *Las Vegas Review Journal* columnist Erin Neff, State Treasurer Krolicki stated that he would attempt to limit the advertising campaign after the close of candidate filing. The conversation with Ms. Neff focused on television advertising. Thereafter, Treasurer Krolicki asked UPromise, and UPromise agreed, to stop running the television advertising at the end of March. The June mailing is specifically called for in the Rose/Glenn Group's marketing plan and eliminating the June mailing did not even cross Mr. Krolicki's mind.
- The advertisements at issue were created and disseminated in the course of carrying out the duties of the State Treasurer and are not, therefore, prohibited by Section 281.554. Moreover, to the extent that the State Treasurer may be said to be "employed" by the board (since he is specifically designated to serve as chairman of the board), the advertising is made available to the public on a regular basis (for the past six years) and "describes the functions of" the board and the plans.
- No public money was spent on the advertisements mentioned in the complaint and the advertisements were in furtherance of Mr. Krolicki's statutory duties.

F. PERTINENT STATUTES AND REGULATIONS:

NRS 281.481 General requirements; exceptions. A code of ethical standards is hereby established to govern the conduct of public officers and employees:

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.

2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281.501.¹

(b) "Unwarranted" means without justification or adequate reason.

* * * * *

¹ NRS 281.501 (8) states: "... As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:

- (a) Who is a member of his household;
- (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
- (c) Who employs him or a member of his household;
- (d) With whom he has a substantial and continuing business relationship; or
- (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

7. A public officer or employee, other than a member of the Legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of his public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

➔ If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

NRS 281.554 Public officer or employee prohibited from requesting or otherwise causing governmental entity to incur expense or make expenditure to support or oppose ballot question or candidate in certain circumstances.

1. Except as otherwise provided in subsections 4 and 5, a public officer or employee shall not request or otherwise cause a governmental entity to incur an expense or make an expenditure to support or oppose:

(a) A ballot question.

(b) A candidate.

2. For the purposes of paragraph (b) of subsection 1, an expense incurred or an expenditure made by a governmental entity shall be considered an expense incurred or an expenditure made in support of a candidate if:

(a) The expense is incurred or the expenditure is made for the creation or dissemination of a pamphlet, brochure, publication, advertisement or television programming that prominently features the activities of a current public officer of the governmental entity who is a candidate for a state, local or federal elective office; and

(b) The pamphlet, brochure, publication, advertisement or television programming described in paragraph (a) is created or disseminated during the period specified in subsection 3.

3. The period during which the provisions of subsection 2 apply to a particular governmental entity begins when a current public officer of that governmental entity files a declaration of candidacy or acceptance of candidacy and ends on the date of the general election, general city election or special election for the office for which the current public officer of the governmental entity is a candidate.

4. The provisions of this section do not prohibit the creation or dissemination of, or the appearance of a candidate in or on, as applicable, a pamphlet, brochure, publication, advertisement or television programming that:

- (a) Is made available to the public on a regular basis and merely describes the functions of:
- (1) The public office held by the public officer who is the candidate; or
 - (2) The governmental entity by which the public officer who is the candidate is employed; or
- (b) Is created or disseminated in the course of carrying out a duty of:
- (1) The public officer who is the candidate; or
 - (2) The governmental entity by which the public officer who is the candidate is employed.
5. The provisions of this section do not prohibit an expense or an expenditure incurred to create or disseminate a television program that provides a forum for discussion or debate regarding a ballot question, if persons both in support of and in opposition to the ballot question participate in the television program.
6. As used in this section:
- (a) “Governmental entity” means:
- (1) The government of this State;
 - (2) An agency of the government of this State;
 - (3) A political subdivision of this State; and
 - (4) An agency of a political subdivision of this State.
- (b) “Pamphlet, brochure, publication, advertisement or television programming” includes, without limitation, a publication, a public service announcement and any programming on a television station created to provide community access to cable television. The term does not include:
- (1) A press release issued to the media by a governmental entity; or
 - (2) The official website of a governmental entity.
- (c) “Political subdivision” means a county, city or any other local government as defined in NRS 354.474.

G. RESULTS OF INVESTIGATION:

Factual History:

- As State Treasurer, Mr. Krolicki, pursuant to NRS Chapter 353B, is charged with administering Nevada’s Prepaid Tuition Trust Fund and Nevada’s College Savings Program.
- Both qualify as “529” plans under the applicable section of the Internal Revenue Code.
- Upromise administers Nevada’s College Savings Program. The contract with Upromise has been approved by the Board of Trustees of the College Savings Plans of Nevada. The approved contract provides for Upromise to conduct marketing activities to generate interest in the College Savings Program. The costs of the marketing activities are borne by Upromise as part of its contract and not by taxpayers out of the State General Fund.
- Mr. Krolicki was asked by Upromise to appear in television advertisements or brochures promoting the College Savings Program.
- It is a regular practice throughout the country for state treasurers to appear in advertisements promoting college savings programs in their states.
- Mr. Krolicki does not receive any remuneration, other than his salary as State Treasurer, for appearing in the advertisements.

- Direct mail advertising is targeted only at parents of children for whom a college savings plan might be beneficial.
- The board approves the marketing plan and materials.
- In the history of the plans, two different advertising agencies have handled the marketing of the plans.
- R&R Advertising was the first agency to handle the marketing of the plans.
- The first television commercial for the plans was a public service announcement featuring State Treasurer Krolicki and then U.S. Senator Richard Bryan. This advertisement first aired in late 2000 and continued into 2001. Another public service announcement featuring State Treasurer Krolicki ran in 2002 and 2003.
- Paid advertising began in late 2001.
- In 2002, the board of trustees entered into a new contract to market the plans with The Rose/Glenn Group.
- Marketing of the plans is funded both by fees that are paid to the State Treasurer to cover costs of administering the plans and by direct expenditures by the fund managers.
- No general fund money is used to administer or market the plans.
- Mr. Krolicki was featured in the television advertisements for the plans in 2003, 2004, 2005 and 2006.
- At the request of Mr. Krolicki, television advertising for the plans in 2006 ceased after March because he was concerned about the perception the ads might create while he was running for office.
- Mr. Krolicki is running for the office of Nevada Lieutenant Governor.
- Direct mail to targeted households went out in April of both 2005 and 2006 and June of 2005 and 2006 to coincide with filing of federal income taxes and with graduation. Direct mail pieces were also sent in September and December of 2005 to coincide with the beginning of the school year and the holidays.
- No further marketing is planned after the June 2006 mailing because Rose/Glenn's contract has expired and a new Request For Proposal has not been issued.

H. CONCLUSION:

Allegation that Mr. Krolicki violated NRS 281.481(1) by: accepting advertising that promotes his candidacy for Lt. Governor; accepting tickets to the WIN 19th Annual Dinner, tickets to an event at the Nevada Museum of Art, and an in-kind contribution by a partner in the Rose-Glenn Advertising agency.

There is no evidence to support the fact that the ads for the College Savings Fund program or the Nevada Pre-paid Tuition Fund were used for the purpose of promoting Mr. Krolicki in his bid for lieutenant governor. The ads began at least 4 years prior to what the Requester has alleged and have always had Mr. Krolicki or his voice in them. In his response, Mr. Krolicki explains that even though he appears in these ads (either on screen or his voice) his appearance is typically 5 seconds of a 30 second ad.

Pursuant to NRS 281.571(2) (e) Mr. Krolicki is required to report gifts he has received in excess of an aggregate value of \$200 from a donor during the preceding taxable year on his Financial

Disclosure Statement (FDS). The evidence shows that these tickets had an aggregate value of \$119 and were therefore not required to be reported on his FDS.

The Executive Director does not believe that any credible evidence exists to substantiate a potential violation of NRS 281.481(1) with regard to this allegation. Accordingly, the Executive Director recommends the panel find just and sufficient cause does not exist for the Commission to hold a hearing and render an opinion regarding whether Mr. Krolicki violated the provisions of NRS 281.481(1).

Allegation that Mr. Krolicki violated NRS 281.481(2) by using his position as Treasurer and running ads to increase name recognition while he is also running for Lt. Governor, and expending public funds to promote himself, which the requester characterizes as an unwarranted “privilege, preference or advantage” not available to any other candidate.

In order for a violation of NRS 281.481(2) to be sustained, the evidence must establish both that the public officer (1) ***used*** his position in government and (2) that he secured² unwarranted privileges, preferences, exemptions, or advantages through this ***use***. The evidence does not establish any such use in this case.

No evidence was provided with the complaint or uncovered during the course of the investigation to support the allegation that Mr. Krolicki used his position to either secure or grant an advantage for himself or any business in which he has a significant pecuniary interest. Nor is there any evidence demonstrating Mr. Krolicki used his position to benefit any person to whom he has a commitment in a private capacity. Mr. Krolicki denies the allegation that the ads were run in order to increase his name recognition and that there were public funds expended for these ads. There is no evidence that contradicts this assertion.

The Executive Director does not believe that any credible evidence exists to substantiate a potential violation of NRS 281.481(2) with regard to this allegation. Accordingly, the Executive Director recommends the panel find just and sufficient cause does not exist for the Commission to hold a hearing and render an opinion regarding whether Mr. Krolicki violated the provisions of NRS 281.481(2).

Allegation that Mr. Krolicki violated NRS 281.481(7) by using state equipment toward the marketing effort of the programs and using state time toward the production of the advertisements.

No evidence was provided with the complaint or uncovered during the course of the investigation to support the allegation that Mr. Krolicki used state equipment toward the

²Commission Opinion 04-77 (Boggs-McDonald) states the following:

“In its analysis, the Commission looked to past opinions for guidance in interpreting NRS 281.481(2). While at least one prior opinion held that a public officer who merely attempts, but does not succeed, in securing or granting an unwarranted advantage does not violate NRS 281.481(2) (see *Matter of William Barrett, CEO No. 01-08A*), several members of this Commission believe that such an interpretation would be at odds with legislative intent and that merely making an attempt to obtain an unwarranted benefit would in fact bring the activity within the parameters of NRS 281.481(2).”

marketing effort of the programs and state time toward the production of the advertisements. Mr. Krolicki denies this allegation and states in his response that the advertisements were carried out in the course of his position as State Treasurer, and that there were no public funds expended for these ads. The evidence demonstrates that Mr. Krolicki has a duty to market these programs, therefore, justifying the use of governmental equipment and time.

The Executive Director does not believe that any credible evidence exists to substantiate a potential violation of NRS 281.481(7). Accordingly, the Executive Director recommends the panel find just and sufficient cause does not exist for the Commission to hold a hearing and render an opinion regarding whether Mr. Krolicki violated the provisions of NRS 281.481(7).

Allegation that Mr. Krolicki violated NRS 281.554 due to the fact that his office recently sent out a mailer causing the state to incur an expense in support of his candidacy.

NRS 281.554 prohibits a public officer or employee from requesting or otherwise causing a governmental entity to incur an expense or make an expenditure to support or oppose a ballot question or candidate. However, after reviewing the applicable statutes (NRS 353B.155, .350(4), .360, .370(6) and .370(8)) and the August 25, 2003, Resolution of the Board of Trustees of the College Savings Plans of Nevada, it appears that NRS 281.554 is not applicable to this specific set of facts and circumstances. There is clear evidence that marketing of these plans is Mr. Krolicki's duty.

The Executive Director does not believe that any credible evidence exists to substantiate a potential violation of NRS 281.554. Accordingly, the Executive Director recommends the panel find just and sufficient cause does not exist for the Commission to hold a hearing and render an opinion regarding whether Mr. Krolicki violated the provisions of NRS 281.554.

The Executive Director hereby recommends the panel find just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion on the allegations that the subject violated NRS 281.481(1), NRS 281.481(2), NRS 281.481(7) and NRS 281.554 and further that the allegations be dismissed.

Prepared by: Matt C. DiOrio DATED: *October 3, 2006*
MATT C. DI ORIO
SENIOR INVESTIGATOR

Approved by: Pat Hearn DATED: *October 3, 2006*
L. PATRICK HEARN
EXECUTIVE DIRECTOR